Supreme Court, U.S.
FILED
SEP 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-247

in the

Supreme Court of the United States

October Term 1988

PRUDENTIAL-BACHE SECURITIES INC.,

Petitioner,

vs.

J. RICHARD FINN and REGINA R. FINN,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

Curtis Carlson
Counsel of Record
and
Lloyd R. Schwed
Courthouse Center, 11th Floor
175 N.W. First Avenue
Miami, Florida 33128-1817
Telephone (305) 358-6550

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REASONS FOR GRANTING WRIT	1
I. THE FLORIDA SUPREME COURT DENIED PRUDENTIAL-BACHE'S PETITION TO INVOKE DISCRETIONARY JURISDICTION AND THIS THIS MATTER HAS BEEN RULED UPON BY THE COURT OF LAST RESORT IN FLORIDA	1
II. FEDERAL LAW IS CONTROLLING ON THE ISSUE OF WAIVER OF THE RIGHT TO ARBITRATION UNDER THE FEDERAL ARBITRATION ACT AND THE STATE COURT'S DECISION DIRECTLY CONFLICTS WITH SUPREME COURT PRECEDENT AND THE MANDATE OF CONGRESS	2
CONCLUSION	6
CERTIFICATE OF SERVICE	8
APPENDIX	A-1
APPENDIX A—Order of the Florida Supreme Court Denying Petition to Invoke Discretionary Review	

TABLE OF AUTHORITIES

Case	Page
ATSA of California, Inc. v. Continental Ins. Co., 702 F.2d 172 (9th Cir. 1983)	4
Benoay v. Prudential-Bache Securities, Inc., 805 F.2d 1437 (11th Cir. 1986)	4
E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas, 599 F.2d 268, (5th Cir. 1977) *cert. denied*, 434 U.S. 1067 (1978)	4
Finn v. Prudential-Bache Securities, Inc., 523 So.2d 617, 620 (Fla. 4th DCA 1988)	4
Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	3
Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 712 F.2d 270, 272 (7th Cir. 1983)	4
Oppenheimer & Co., Inc. v. Young, 434 So.2d 369 (Fla. 3d DCA 1983), *aff'd*, 456 So.2d 1175 (Fla. 1984), *vacated*, 470 U.S. 1078, (1985), *on remand*, 475 So.2d 221 (Fla. 1985)	6
Price v. Drexel Burnham Lambert, Inc., 741 F.2d 115 (5th Cir. 1986)	4

TABLE OF AUTHORITIES—(Continued)

Case	Page
Southland Corp. v. Keating, 465 U.S. 1, 13 (1984)	3

Other Authorities

28 U.S.C. §1257(3)	1
Fla.R.App.P. 9.330(d)	1

REASONS FOR GRANTING WRIT

I.

THE FLORIDA SUPREME COURT DENIED PRUDENTIAL-BACHE'S PETITION TO INVOKE DISCRETIONARY JURISDICTION AND THUS THIS MATTER HAS BEEN RULED UPON BY THE COURT OF LAST RESORT IN FLORIDA

Respondents' primary basis for opposing the Petition for Writ of Certiorari is that the question presented herein has not been ruled upon by Florida's court of last resort in accordance with 28 U.S.C. §1257(3). *Brief in Opposition* at 5-9. Indeed, at least half of Respondents' argument deals with this "highest state-court" requirement.

That issue is now moot. By opinion dated September 8, 1988, the Florida Supreme Court denied Prudential-Bache's Petition to Invoke Discretionary Jurisdiction on the very issues presented herein.[1] *See* Order Denying Petition at App. A. Accordingly, this Petition unquestionably now involves a final judgment rendered by the highest court in Florida.

---

[1]The Florida Supreme Court does not permit motions for rehearing on denials of Petitions to Invoke Discretionary Jurisdiction. *See* Fla.R.App.P. 9.330(d).

II.

FEDERAL LAW IS CONTROLLING ON THE ISSUE OF WAIVER OF THE RIGHT TO ARBITRATION UNDER THE FEDERAL ARBITRATION ACT AND THE STATE COURT'S DECISION DIRECTLY CONFLICTS WITH SUPREME COURT PRECEDENT AND THE MANDATE OF CONGRESS

Respondents' entire argument can be summarized in one sentence:

> While the Federal Arbitration Act applies in both state and federal courts as to the issue of arbitrability, *where a case involves only state law claims, state law applies to the issue of waiver* of a right to arbitration.

Brief in Opposition at 10 (emphasis supplied).

Respondents do not cite any case or statute to support this argument.[2] More importantly, this

---

[2]In essence, Respondents take the position that state law preempts federal law on the issue of whether a party has waived the right to arbitration under the Federal Arbitration Act. Assuming for the sake of argument that Respondents are correct, it would mean that each state would fashion its own interpretation of what constitutes waiver under the Federal Arbitration Act. The uniformity of interpretation of this very important federal statute would soon be lost.

argument directly contradicts the Supreme Court's decision in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). In that case, the Hospital asserted that Mercury had waived its right to arbitrate a dispute involving only state law claims. This Court stated:

> The basic issue presented in Mercury's federal suit was the arbitrability of the dispute between Mercury and the Hospital. *Federal law* in the terms of the Arbitration Act *governs that issue in either state or federal court.*
>
> * * *
>
> *The Arbitration Act establishes that, as a matter of federal law, any doubts* concerning the scope of arbitrable issues *should be resolved in favor of arbitration*, whether the problem at hand is the construction of the contract language itself *or an allegation of waiver*, delay or a like defense to arbitrability.

Moses H. Cone, 460 U.S. 24-26 (emphasis supplied). *See also Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984).

Respondents attempt to distinguish *Moses H. Cone* on the basis that the *Finn* case involves only state law claims and, therefore, Florida law applies to the issue of waiver. However, the underlying dispute in *Moses H. Cone* involved only state law claims for breach of

contract. 460 U.S. at 19. Thus, Respondents' argument has no support in law or reason.[3]

Federal law requires a showing of both inconsistent acts *and* actual prejudice to support a finding of waiver. *ATSA of California, Inc. v. Continental Ins. Co.*, 702 F.2d 172 (9th Cir. 1983); *Price v. Drexel Burnham Lambert, Inc.*, 741 F.2d 115 (5th Cir. 1986); *Benoay v. Prudential-Bache Securities, Inc.*, 805 F.2d 1437 (11th Cir. 1986). Under federal law, "prejudice is the essence of waiver." *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas*, 599 F.2d 268, 269 (5th Cir. 1977) *cert. denied*, 434 U.S. 1067 (1978). "Inconsistent behavior alone is not sufficient; the party opposing the motion to compel arbitration must have suffered prejudice." *ATSA of California*, 702 F.2d at 175. In this case, Respondents did not and could not demonstrate any prejudice resulting from the insignificant acts taken by Prudential-Bache.

Nevertheless, Florida's Fourth District Court of Appeal ignored Supreme Court precedent and the Supremacy Clause to deny Prudential-Bache's right to arbitration, holding that "a showing of prejudice is not required if waiver is based upon inconsistent acts." *Finn v. Prudential-Bache Securities, Inc.*, 523 So.2d 617, 620 (Fla. 4th DCA 1988).

---

[3]It is important to note that the concept of waiver expressly arises under the default provision of the Federal Arbitration Act, 9 U.S.C. §3. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 712 F.2d 270, 272 (7th Cir. 1983), *cert. denied*, 464 U.S. 1002 (1983). It defies logic, therefore, to conclude that state law preempts federal law on the issue of waiver under the Federal Arbitration Act.

Unless this Court invokes its certiorari jurisdiction and vacates *Finn*, Florida law will be in direct conflict with federal law under the Federal Arbitration Act. Further, the door will be open for other states to do the same. Consequently, Prudential-Bache and other litigants will be able to enforce arbitration agreements in federal court, but not in state court. Inevitably, this will encourage litigants to circumvent the Federal Arbitration Act through forum-shopping in state courts and among state courts, and the federal policy favoring arbitration will be eviscerated.

CONCLUSION

This Petition presents questions of great national importance. The first involves the need for uniformity of interpretations under the Federal Arbitration Act. The second arises from the crushing pressure of a litigation-prone society. Congress has responded by establishing a federal right to enforcement of arbitration agreements under the Federal Arbitration Act in an effort to stem the rising tide at the courthouse steps.

This Court has repeatedly recognized the reality that the Arbitration Act will be effective only if "unencumbered by state-law constraints." *Southland*, 465 U.S. at 13. Florida courts have tried to reject this mandate and detach themselves from the national statutory scheme favoring arbitration in the past, but have been stopped by this Court. *Oppenheimer & Co., Inc. v. Young*, 434 So.2d 369 (Fla. 3d DCA 1983), *aff'd*, 456 So.2d 1175 (Fla. 1984), *vacated*, 470 U.S. 1078, (1985), *on remand*, 475 So.2d 221 (Fla. 1985). Unless this Court invokes its certiorari jurisdiction again and vacates *Finn*, other state courts inevitably will follow Florida's new lead and begin to create their own local rules and exceptions to the Federal Arbitration Act. It

will truly be the beginning of the end for the *uniform national policy* favoring arbitration.

Respectfully submitted,

CURTIS CARLSON
Counsel of Record
LLOYD R. SCHWED
FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A.
Attorneys for Petitioner
CourtHouse Center, 11th Floor
175 N.W. First Avenue
Miami, Florida 33128-1817
Telephone: (305) 358-6550

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 29th day of September, 1988 to: Gloria O. North, Esq., Mattlin, McClosky & North, 5355 Town Center Road, Suite 901, Boca Raton, Florida 33486.

CURTIS CARLSON
LLOYD R. SCHWED

Appendix

APPENDIX A

Supreme Court of Florida

THURSDAY, SEPTEMBER 8, 1988

CASE NO. 72,584

District Court of Appeal,
Fourth District No. 85-1118

PRUDENTIAL-BACHE SECURITIES, INC.,
a Delaware corporation,

Petitioner,

v.

J. RICHARD FINN and REGINA FINN,

Respondents.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, Acting C.J., SHAW, GRIMES and KOGAN, JJ., concur
BARKETT, J., dissents

A True Copy

TEST:

Sid J. White
Clerk
Supreme Court

[Seal]

By: /s/ Betty Hill
Deputy Clerk

H

cc: Hon. Clyde L. Heath, Clerk
Hon. John B. Dunkle, Clerk
Hon. Harold J. Cohen, Judge

Lloyd R. Schwed, Esquire
Gloria O. North, Esquire